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EX PARTE OR LATE FILED



December 1, 1999

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

RE: Application by New York Telephone Company (d/b/a Bell Atlantic - New York), et al., for Authorization To Provide In-Region, InterLATA Services in New York, Docket No. 99-295 /

Dear Ms. Salas:

The attached analysis of the New York PSC's and Department of Justice's evaluations of the Bell Atlantic - New York's long distance application is provided in response to a request from Ms. Sarah Whitesell, Legal Advisor to Commissioner Tristani, following a telephone discussion on November 30, 1999.

As outlined in the Public Notice (DA-99-2014) issued by the FCC on September 29, 1999, the 20 page ex parte limit does not apply to this ex parte since Bell Atlantic is responding to direct questions raised by Ms. Whitesell.

Please feel free to contact me with any questions.

Sincerely,

A handwritten signature in cursive script, appearing to read 'Susanne Guyer'.

Attachment

cc: A. Kearney
S. Whitesell

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NEW YORK PSC AND DOJ FILINGS

Role of the State.

The FCC has said that, because it has only 90 days to grant or deny long distance applications, it will rely on the state commissions to build a factual record and undertake a detailed analysis of checklist compliance.

The New York PSC has done precisely that, and has verified unequivocally that Bell Atlantic "has met the requirements of § 271(c) of the Telecommunications Act of 1996." PSC Eval. at 1. The PSC took evidence from scores of witnesses under oath and subject to cross examination. Based on a "painstaking analysis" by a "team of telecommunications engineers, financial analysts, economists, accountants, and attorneys" that "took more than two years, included thousands of hours of discussions with Bell Atlantic-NY competitors and with interested government agencies and took into account all aspects of each issue" the New York PSC has unequivocally concluded "*that the Checklist is being met.*" PSC Eval. at 3 (emphasis added).

Likewise, based upon its own exhaustive review and the 15-month-long test conducted by independent auditor KPMG, the New York PSC expressly found that Bell Atlantic "is providing access to OSS in compliance with [the] Checklist," and that its systems are capable of handling current and expected future demand. *Id.* at 7. According to the PSC, the KPMG test of Bell Atlantic's "OSS interfaces, documentation, and processes . . . demonstrates Bell Atlantic-NY's ability to handle a broad array of resale, unbundled network elements, unbundled network element platform and combination orders *at reasonably foreseeable volumes* in a nondiscriminatory manner." *Id.* at 34 (emphasis added).

The PSC also reiterated its conclusion on reply. According to the PSC, its original Evaluation "advised the Commission that, following two and a half years of review, testing and process improvements, Bell Atlantic-NY *had met the Checklist requirements* of § 271(c). . . . After review of the other parties' comments, *we reiterate that conclusion.*" PSC Reply at 1 (emphasis added).

DOJ Filing.

DOJ also has agreed with virtually all the New York PSC's conclusions, and says its "assessment of the facts regarding Bell Atlantic's wholesale performance is substantially consistent with the NYPSC's assessment." DOJ Eval. at 13.

For two of the three entry paths available to competing carriers -- facilities-based entry and resale -- DOJ gives Bell Atlantic a clean bill of health. According to DOJ, "we have no substantial concerns about the ability of facilities-based carriers to enter the market," and "the Department does not believe that there are performance deficiencies that are significantly impeding entry by resellers." DOJ Eval. at 10, 12.

For the third entry path, DOJ expressed only two limited concerns. Except for these narrow issues, DOJ acknowledges that Bell Atlantic has completed "all ... of the actions needed to achieve a fully and irreversibly open market in New York." DOJ Eval. at 1. And with respect to its two remaining concerns, DOJ did not examine the complete record and got a number of its facts wrong.

DOJ concedes that "the Commission may obtain information not currently available to the Department that would support" a conclusion that Bell Atlantic has satisfied its concerns, and that information from reply comments may "justify a conclusion by the Commission different from that reached by the Department." DOJ Eval. at 28, 41. "[I]n light of the substantial record of progress in New York reflected in the record, we do not foreclose the possibility that the Commission may be able to approve this application at the culmination of these proceedings." Id. at 43.

DOJ's Concerns.

Both concerns raised by DOJ have been exhaustively reviewed by the New York PSC, which confirmed that Bell Atlantic has met the checklist.

As the PSC explained in its November 8 reply comments, "[t]he record contains substantial proof that each Checklist item is being met, that Bell Atlantic-NY's systems are adequately handling the sharp increases in demand brought about by the introduction of mass-market competition, and that Bell Atlantic-NY's loop performance is adequate." PSC Reply at 3.

Unbundled loops. DOJ expresses concern only about a limited subset of the unbundled loops that competitors are using in New York -- those that require a "hot cut" or are used to provide DSL service.

-- DOJ's concerns affect only a small fraction of the total loops that Bell Atlantic provides in New York. In each case, the orders on which questions have been raised constitute less than 1 percent of total unbundled loops.

-- The hot cut issues have been subject to "concentrated and prolonged attention" by the PSC, which concluded that "the issues affecting competition have been resolved and on-time performance has been demonstrated." PSC. Eval. at 97, 99. Based on a detailed reconciliation of tens of thousands of pages of evidence, the PSC concluded that Bell Atlantic's "on-time provisioning of hot cut loops has been close to, at, or above 90% since July 1999." PSC Reply at 28. "This performance level cannot, under any definition, be considered discriminatory." Id. And the PSC expressly concluded that the "discrepancy between the AT&T data and the Bell Atlantic-NY data was explained primarily by AT&T errors or idiosyncratic operational definitions of measurement terms." Id. at 27.

-- DSL is a new service, and installing loops for use to provide DSL is more complicated than traditional voice services and requires extensive cooperation from competing carriers. Nonetheless, the service that Bell Atlantic provides to CLECs is at least as good as for its own DSL service thus meeting the legal requirement to provide parity of service, and our filings laid out these facts in detail. DOJ's filing, however, ignores the fact that we are treating competitors at least as well as we treat ourselves.

-- Moreover, the PSC has explained that it is conducting an on-going collaborative proceeding to further refine provisioning processes and to address "shortcomings in CLEC operations," as well as areas for improvement by Bell Atlantic. PSC Reply at 2, 34. According to the PSC, "this collaborative is yielding results"; when the parties employ the cooperative testing procedures agreed to there, "performance improves" and "orders tend to complete successfully." *Id.* at 2, 34-35.

Flow through for platform orders. DOJ also expresses concerns about the number of so-called platform orders that automatically flow all the way through Bell Atlantic's systems.

-- As an initial matter, DOJ has its facts wrong. It says Bell Atlantic is flowing through about 50 percent of platform orders. In fact, about 70 percent of platform orders currently flow through, and the figure is more than 80 percent when it's adjusted to take into account the orders that don't flow through because of CLEC errors.

-- At current flow through levels, Bell Atlantic is completing 99 percent of platform orders on time.

-- DOJ's concern is solely a prospective one. It agrees that "[i]t does not appear that the manual processing is creating serious customer-affecting service problems at current volumes." DOJ Eval. at 32. It merely expresses concern about whether flow through will be adequate to handle future volumes.

-- The question of whether Bell Atlantic will be able to handle *future* volumes can reasonably be assessed only in relation to *future* capabilities. The New York PSC and KPMG both concluded that Bell Atlantic's systems "are scalable."

-- The PSC explained that real world experience proves "that Bell Atlantic-NY has the capability to handle real-world increases in volume." PSC Reply at 13. "During the first eight months of this year alone, UNE-P orders have increased twelve-fold. Despite this very large increase, Bell Atlantic-NY achieved a 70% improvement in its UNE-P order flow-through" – with fully 70% of platform orders flowing through in September. *Id.* "These simultaneous increases in volume and in flow-through demonstrate that Bell Atlantic-NY's

systems are scalable and that flow-through levels can improve even as demand increases sharply." Id.

-- Bell Atlantic also has committed to a schedule with the New York PSC for adding still further flow through capabilities to its systems, and agreed to a performance assurance plan that puts \$10 million annually at risk if it fails to meet the stringent flow through objectives set by the PSC. PSC Reply at 15.

Performance Assurance Plan. Some parties have suggested the New York PSC is relying on its Performance Assurance Plan -- which puts \$269 million at risk annually -- to bring Bell Atlantic into compliance with the checklist.

-- This is simply wrong. The PSC repeatedly has emphasized that Bell Atlantic already "*has met the Checklist requirements.*" E.g., PSC Reply at 3 (emphasis added).

-- The PSC also explained that the Performance Assurance Plan is designed to "ensure a level of service quality *beyond* what is statutorily required for long distance entry." PSC Reply at 2 (emphasis added). "As we stressed in our Evaluation, the plan is *not* intended to define the level of service required to meet the competitive checklist, or to bridge an alleged gap between Bell Atlantic-NY's current level of performance and the level required to meet the Checklist requirement. Therefore, criticisms of Bell Atlantic-NY's performance under the plan have little bearing on Checklist compliance." Id. at 2-3 (emphasis added).

In short, Bell Atlantic is in compliance with the checklist *today*, and should be allowed into long distance *today*.